UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FERNANDO FRANCISCO REYES,	:	
Petitioner,	:	
	:	**Crim. No. B-90-47 (AHN)**
v.	:	**Civ. No. 3:94cv1429 (AHN)**
	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2255

Petitioner Fernando Francisco Reyes seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255, challenging the sentence imposed on him for conspiracy to import cocaine under 21 U.S.C. §§ 952(a), 960(A)(1), 960(b)(1)(B), and 963. Reyes pleaded guilty and was sentenced on February 26, 1993 to 188 months imprisonment and 5 years supervised release. He now moves to correct his sentence. As set forth below, his petition [Dkt. #1] is denied.

BACKGROUND

On September 20, 1990, Reyes was arrested by United States Customs Agents in Stamford, Connecticut, along with his son, Francisco Fernando Reyes[1], who was also a co-defendant in

[1] While it has been Francisco Fernando Reyes's practice to file joint motions with his father, the record indicates that he has not properly petitioned for a § 2255 habeas writ. Nonethe-less, since the same set of facts and law exist as between the two, and because Francisco Fernando Reyes would now be time-barred from filing a proper petition, this ruling applies equally to him.

the criminal case. Their arrests were part of an investigation dealing with the discovery of a canister holding over 66 kilograms of cocaine fastened along the hull of the cargo ship *Potomac*, that was docked in Bridgeport Harbor. A detailed account of those events is contained in United States v. Reyes, 9 F.3d 275 (2d Cir. 1993).

Reyes pleaded guilty to a single-count superseding indictment that charged him with conspiring to import more than 5 kilograms of cocaine into the United States. As part of the plea agreement, the government was to recommend a two-level decrease in Reyes's base offense level for his admission of guilt. The recommendation was conditioned on Reyes's complete disclosure of the events pertinent to the offense, as well as for his full acceptance of personal responsibility.

At the plea allocution, the government outlined its proof, which included evidence showing that Reyes's task was not simply to survey the *Potamac* for the canister, but to actually retrieve it. While Reyes disagreed with that characterization, this court nonetheless accepted his plea of guilty because his precise role was not an essential element of the charged offense. Still, the court found that Reyes's task was in fact to retrieve the cocaine from the ship, and that by failing to admit that role, he did not tell the entire

truth about his involvement in the conspiracy. Thus, while the court made a two-level reduction for his minor role in the crime, it declined to make a similar reduction based on acceptance of guilt. The court imposed a sentence of 188 months and 5 years supervised release. Reyes now moves to have the sentence corrected.

DISCUSSION

Reyes contends that his sentence should be reduced to 10 years, from the 15.7 years imposed, because the government purposely withheld evidence. Specifically, Reyes argues that the government concealed a DEA-6 document dated October 9, 1990, which contained allegedly exculpatory statements about his role in the conspiracy. The government, however, claims that it fully complied with the discovery order, and that it did not wrongfully withhold anything from him. The government also maintains that Reyes's habeas petition is time-barred pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and therefore must be denied.

A. The AEDPA's One-Year Statute of Limitations

As an initial matter, the court addresses the government's contention that Reyes's § 2255 habeas petition is time-barred under the AEDPA, which took effect on April 24, 1996. The Act amended § 2255 to include a one-year limitation

period within which habeas petitions must be filed. See 28 U.S.C. § 2255. The limitation period runs from the latest of one of four dates, one of which is the date that a petitioner's judgment of conviction becomes final. See id. For convictions, such as Reyes's, which became final before the Act's effective date, there is a one-year grace period ending on April 24, 1997. See Mickens v. United States, 148 F.3d 145, 147-48 (2d Cir. 1998).

Reyes's conviction and sentence was affirmed by the Second Circuit on November 30, 1993, and became final on February 28, 1994, since he did not seek certiorari to the United States Supreme Court. See Rules of the Supreme Court, Rule 13. He later filed a Petition for Writ of Coram Nobis on October 17, 1994. The Court construed that petition as a § 2255 habeas writ, and denied it on July 9, 1996. On October 11, 1996, Reyes filed a notice of appeal with the Second Circuit, but did not receive certification from this court. Thus, the Court of Appeals dismissed his claim. His appeal was reinstated on August 1, 1997 in light of Lindh v. Murphy, 521 U.S. 320 (1997). On November 13, 1997, the Court of Appeals, also construing Reyes's petition as a § 2255 writ, dismissed it. On September 14, 1999, however, the court vacated the 1997 dismissal, apparently in light of its

decision in Adams v. United States, 155 F.3d 582 (2d. Cir. 1998) (halting district courts' practice of recharacterizing pro se motions brought by federal prisoners under other provisions as 28 U.S.C. § 2255 petitions). On November 4, 1999, Reyes filed the instant § 2255 habeas petition.

While it is true that Reyes did not file this petition until well after the April 24, 1997, grace period, it is not time-barred under the equitable tolling rule enumerated in Green v. United States, 260 F.3d 78, 82 (2d. Cir. 2001) (holding that in certain circumstances the AEDPA's one-year deadline may be equitably tolled). Equitable tolling may be used in exceptional circumstances where the defendant has acted with reasonable diligence. See Smith v. McGinnis, 208 F.3d 13, 17-18 (2d Cir. 2000). The record reflects that Reyes acted with reasonable diligence in attempting to pursue habeas relief.

Reyes initially filed, albeit improperly, a Writ for Error Coram Nobis, which the district court construed as a motion under § 2255 -- the accepted practice at the time -- and obviated the need for him to file another separate § 2255 petition. Though both the District Court and the Court of Appeals at first denied Reyes's petition, the appellate dismissal was later vacated because of error. Erroneous

denials clearly constitute extraordinary circumstances and warrant equitable tolling. Thus, the court finds that the one-year limitation period in this case did not begin to run until September 14, 1999 -- the date on which the Second Circuit vacated its prior dismissal of Reyes's petition. Accordingly, Reyes's instant petition, which was filed on November 4, 1999, is not time-barred.

B. Correction of Sentence Under § 2255

Section 2255 provides, in pertinent part, that "[a] prisoner in custody under sentence of a court . . . may move the court which imposed the sentence to . . . correct the sentence." Here, Reyes petitions for a reduction of sentence to 10 years, from the 15.7 years imposed by the court, based on the claim that the government withheld a DEA-6 document, dated October 9, 1990, that allegedly contains exculpatory statements by Rafael Reyes, his brother and a co-conspirator-turned-informant. Supposedly the DEA-6 substantiates Reyes's claim that his role in the conspiracy was limited to merely surveying the *Potomac* for the canister, and not to retrieve the cocaine from the ship. Reyes argues that the document proves he told the entire truth about his role in the conspiracy and that therefore the court should have awarded him the two-level reduction for admission of guilt. In

opposition, the Government claims that it submitted the DEA-6 document to the defense on December 11, 1990. The Government also submits that, while Rafael Reyes initially stated that the conspiracy was limited to merely surveying the ship for the cannister, he subsequently submitted to a proffer agreement that acknowledged the conspirators were to remove the cocaine as well. Clearly, Rafael Reyes's subsequent acknowledgment nullifies any inconsistent statements he had made beforehand, making his prior statements, allegedly contained in the DEA-6 at issue here, immaterial. Accordingly, Reyes's assertion that that document contains exculpatory information, and warrants a reduction for acceptance of responsibility, is not availing.

Moreover, a sentencing court's determination of whether a defendant has fully admitted guilt is a factual finding that will not be disturbed unless it is without foundation. Under United States Sentencing Guidelines §3E1.1, a defendant must clearly demonstrate acceptance of responsibility for his offense. Assuming, for the sake of argument, that the government did in fact conceal the DEA-6 document from the defense and that Rafael Reyes perjured himself in stating that retrieving the cocaine was part of the conspiracy, the question becomes whether there was nevertheless ample

"foundation" for the sentencing court to find that Reyes did not make a complete admission of guilt. The court finds that such a foundation existed.

The transcript from the sentencing proceedings clearly demonstrates the court's dismay at Reyes's incredible character-ization of the facts, stating:

> Mr. Reyes, if I understand your testimony, what you're suggesting to the court is that you . . . came to New York, met with some people . . . obtained money . . . went out [and] either bought or rented diving suits, scuba equipment, rented vans, drove to Connecticut, stayed overnight in hotels, and the whole purpose . . . was simply so you could check to see whether a canister was on the bottom of a ship?

Reyes did not provide a rational explanation for this puzzling version of events. He merely reiterated that his purpose was only to check that the cannister was still intact and that he was supposed to relay this information to someone named "Pepe" in New York. Reyes did suggest, however, that he believed the cannister was to be offloaded at a subsequent port.

Assuming further that Reyes's initial statements about his role in the conspiracy were attributable to his imperfect English, and that the tools found in the trunk of his vehicle were simply for the scuba gear and not to dislodge the cannister from the *Potomac's* hull, Reyes's petition still does not raise a sufficient basis for disturbing the court's

discretionary finding that he lacked complete candor at sentencing. Thus, even if the government improperly withheld the DEA-6 document from the defense, and Rafael Reyes perjured himself, neither of which the court in fact finds, the court's own credibility determination at sentencing, that Reyes did not completely admit guilt, provided ample foundation for its denial of the two-level reduction. Accordingly, Reyes's petition for a correction of sentence must be denied.

CONCLUSION

For the foregoing reasons, plaintiff's petition for a writ of habeas corpus [Dkt. #1.] is DENIED.

So ordered this ___ day of September, 2003 at Bridgeport, Connecticut.

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Alan H. Nevas
Senior United States District Judge